Supreme Court, U.S.
FILED

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Case No. _____

SUPREME COURT

OF THE UNITED STATES

October Term, 1996

ELMER RITTER and HELEN RITTER,

Petitioners,

v.

PEGGY S. ROSS, County Treasurer for Rock County, Wisconsin, and ROCK COUNTY, a body politic in the State of Wisconsin,

Respondents.

Petition for Writ of Certiorari to the Court of Appeals of Wisconsin, District IV

PETITION FOR WRIT OF CERTIORARI

Thomas E. Greenwald*
Ann T. Dempsey
OLIVER, CLOSE, WORDEN,
WINKLER & GREENWALD
P.O. Box 4749
Rockford, IL 61110-4749
Telephone (815)968-7591

*Counsel of Record

110 pp

QUESTIONS PRESENTED

I. Whether the retention by Rock County of the excess proceeds from the sale of plaintiffs' foreclosed property over the amount of the tax allegedly due Rock County was an unconstitutional taking in violation of the 5th Amendment to the U.S. Constitution and/or a violation of plaintiffs' substantive due process rights when no opportunity was presented to recover the excess proceeds from Rock County.

II. Whether Rock County denied Plaintiffs' procedural due process rights when Rock County took Plaintiffs' property in a tax lien foreclosure proceeding without providing any notice of a right to answer, appear or otherwise contest in the proceeding and whether

said pleading was one that was reasonably calculated to give the Plaintiffs notice that the property was subject to a taking in the preceding.

III. Whether a trial court can deny attorney fees under 42 U.S.C. Section 1983 where the plaintiffs have prevailed in obtaining a judgment based on a violation of constitutional rights.

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Ritter v. Ross, et al., 207 Wis.2d 477, 558 N.W.2d 909 (1996). See Appendix A-13.

STATEMENT OF JURISDICTION

The Supreme Court of the State of Wisconsin denied a petition for review in an order dated June 10, 1997, which denial allowed the judgment and order of the Court of Appeals for the State of Wisconsin dated December 12, 1996, to stand.

Jurisdiction of this Court to review the final judgment by Writ of Certiorari is appropriate pursuant to 28 U.S.C. §1257 because judgment has affirmed the procedures allowed under Wisconsin Statutes §75.521 (1989) which procedures are in violation of the procedural and substantive rights of due process guaranteed under Article V and Article XIV of the United States Constitution and which judgment has resulted in a taking of property in violation of the rights to

substantive and procedural due process pursuant to Article V and Article XIV of the United States Constitution.

The Attorney General of the State of Wisconsin has been served with a copy of this Petition because 28 U.S.C. §2403(b) may apply.

STATEMENT OF CASE

On October 30, 1989, Elmer Ritter and Helen Ritter (hereinafter "Ritters") lost their 35 acre farm for the alleged failure to pay $84.43 in property taxes. They lost this property when, under authority of a Rock County ordinance adopting the real estate tax lien foreclosure procedures of Wisconsin Statute §75.521, Rock County obtained a tax lien foreclosure judgment which judgment *inter alia* vested Rock County with an estate in fee simple absolute in the Ritters' farm without any time period after the foreclosure for redemption or right to receive any excess proceeds from any sale by the County.

Ritters did not appear in the *in rem* foreclosure preceding due to inadequate notice thereof. Rock County subsequently

sold the property without notice to the Ritters for an amount in excess of $17,000.00 and retained all of the proceeds.

Neither Section 75.521 Wis. Stats. nor any other provision in the Statutes or the Rock County ordinances, provided for any right to recover the proceeds from the sale of the foreclosed property that were in excess of the amount of the tax that was owed.

Ritters first discovered the foreclosure judgment after the time period for appeal of the judgment of foreclosure had expired.

Ritters subsequently filed a seven count complaint in the Rock County Circuit Court.[1] Counts I and II asserted

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[1]This case was originally filed in the United States District Court for the Western District of Wisconsin. The

claims against the County Treasurer and corporation counsel under 42 U.S.C. §1983 for deprivation of property without due process in violation of the 14th Amendment of the United States Constitution on the basis that the Ritters were not given notice of their right to answer, appear, or otherwise contest the in rem action against their property. Count I and Count II also asserted that the procedure followed

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District Court dismissed the complaint, holding that the Ritters due process claims were not ripe and could not be considered since the State's action is not complete until and unless it provides, or refuses to provide, a suitable post-deprivation remedy. Ritters appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit affirmed the dismissal but for lack of subject matter jurisdiction based on the Rooker-Feldman doctrine. Ritter v. Ross, 992 F.2d 750 (7th Cir. 1993). The Ritters' Petition for Writ of Certiorari to the United States Supreme Court was denied in December, 1993.

which allowed the County to retain the proceeds for the foreclosure sale ($17,345) in excess of the total delinquency of $84.43, was an unconstitutional taking of property. (Wis. Stats. §75.521, Appendix A-52). Count III of the Ritters' Complaint against Rock County asserted the same allegations with respect to the violations of Ritters' constitutional rights as Counts I and II, but Count III was based solely on Rock County's adoption of the ordinance establishing unconstitutional procedures for enforcing property tax liens in Rock County.

Count IV of Ritters' Complaint set out a cause of action against Rock County under the Civil Rights Act for taking Ritters' surplus property without just

compensation in violation of the 5th Amendment.

The case was tried to the court and jury. The jury found that the fair market value of the Ritters property at the time Rock County acquired it was $37,890.00. All other issue were decided by the trial court in an Order for Judgment dated May 17, 1995. (Appendix A-1). The trial court concluded that the 1984 real estate taxes were not paid and the unpaid obligation of the Ritters was $84.43. Although the trial court found that the notice sent to the Ritters entitled, "Notice of Commencement of Proceeding In Rem to Foreclose Tax Liens by Rock County" was adequate notice to the Ritters as to the pendency of the tax lien foreclosure proceedings, the trial court held that there was not sufficient

notice to the Ritters that the County would take and retain property in excess of the $84.43 due to the County.

The trial court also found that the property taken by Rock Count in excess of $84.42 was taken without notice to the Ritters and without any reasonable opportunity for the Ritters to make a claim as to the excess or to defend themselves against the taking of the excess value of the property. The trial court further found that the retention of the excess property was a taking without just compensation in violation of the 5th Amendment to the United States Constitution and in violation of the substantive due process provision of the 14th Amendment to the United States constitution. The Ritters' claim for attorney fees under 42 U.S.C. §1988 was

denied by the trial court based on its finding that Rock County and Peggy Ross did not have the intent to, or with malice, violate the Ritters' constitutional rights or 42 U.S.C. §1988.

The Ritters filed a timely appeal with the Court of Appeals for the State of Wisconsin seeking a reversal of the denial of attorney fees. The County cross-appealed seeking a reversal of the judgment against Ross and the County. The Court of Appeals reversed the finding that Rock County violated the Ritters' constitutional right by failing to provide notice that any surplus proceeds from the foreclosure sale would be retained by Rock County and found that notice was adequate to apprise the Ritters that Rock County may elect to retain any surplus funds from the sale of

the property. The Court of Appeals further held that the retention of the surplus funds was not a violation of any constitutionally protected right. (Appendix A-13).

The Ritters filed a Petition for Review in the Supreme Court of Wisconsin. The Petition for Review was denied in an order dated June 10, 1997. (Appendix A-50).

ARGUMENT

I.

DENIAL OF PROCEDURAL DUE PROCESS

A. Standard of Due Process.

The judgment of the Wisconsin Court of Appeals finding that the "Notice of Commencement of Proceedings In Rem to Foreclose Tax Liens by Rock County" ("Notice"), did not violate the Petitioners' rights to due process of

law, is contrary to the established requirements of procedural due process annunciated by this Court in decisions dating from Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 76 S.Ct. 652 (1950).

The fundamental requisite of due process is the right to be heard and that right has little reality or worth unless one is informed that the matter is pending, the person can choose for himself whether to appear, default, acquiesce or contest and that the notice is reasonably calculated, under all of the circumstances, to reasonably convey all information which would permit a person to make an intelligent decision. Mullane v. Central Hanover Bank & Trust Company, supra. Covey v. Somers, 358 U.S. 141, 76 S.Ct. 725 (1955). The notice must be sufficient to enable the

recipient to determine what he must do to prevent the deprivation of his interest. Goldberg v. Kelly, 397 U.S. 254, 267-68, 90 S.Ct. 1011 (1970).

The content of the "notice" received by the Ritters was not reasonably calculated to and did not:

(1) advise the Ritters that they could dispute the claim that they owed back taxes;

(2) reasonably advise them of the consequences of not taking action in response to the notice, including the loss of their property or the forfeiture of the value of their property in excess of the amount due; and

(3) advise them that in the event of a sale after foreclosure for an amount in excess of the taxes owed, they would be barred from receipt of the proceeds of the sale in excess of the amount of the taxes owed.

This information was necessary for them to make an intelligent decision.

B. Notice of Ability of Right to Contest the Proposed Taking of Property.

The notice did not state that the Ritters had any right to contest the charges but, rather, only generally stated that there was a right to redeem. A notice which, like the notice given to the Ritters which does not advise of the right to contest the proceedings, has been held unconstitutional by this Court. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978). Memphis Light involved a constitutional challenge to a termination of utility services. The constitutional issue was whether due process required a municipal utility to notify the customer of the availability of an avenue of redress within the organization should the customer wish to contest a particular charge. Similar to the notice in this

action, the "Final Notice" in Memphis Light contained on the utility bill simply stated that the payment was overdue and that the service would be discontinued if payment was not made by a certain date. The notice only warned the customer to pay or face termination.

Like the Ritters, the plaintiff in Memphis Light was never apprised of the availability of the procedure to contest. This Court concluded that the customer was not adequately notified of the procedures available at the time to contest the amount of the debt. The Court further held that where there is to be a deprivation of property, a notice that does not reasonably advise a party of the availability of the procedure for protesting does not comply with the constitutional requirements.

This case goes beyond Memphis Light. At least in Memphis Light, the customer was clearly notified of the consequences of any failure to respond. In this instance, the Ritters not only failed to receive notice of a right to contest the alleged debt, they did not receive notice of the consequences of any failure to respond. The notice was even misleading, stating that no personal judgment would be entered. Neither petitioner understood that they had a right to go to court to contest whether or not they owed any taxes for 1984.

C. Right to Notice of What May Happen if County's Action is not Contested.

A fundamental element of the type of notice required to comply with procedural due process, is the right to the receipt of a notice that reasonably conveys all information which would permit a person

to make an intelligent decision regarding what to do to protect their property. Mullane v. Central Hanover Bank & Trust Company, supra. In order for the notice to be in compliance with this fundamental element of due process, the notice must reasonably apprise the recipient that he has rights that may be affected by the proceedings and the consequences of not responding.

While the Wisconsin Court of Appeals recognized that the failure to respond to this "In Rem" action would result in the property owners being completely divested of all rights in the property (Ritter v. Ross, 558 N.W.2d at 913 (1996), Appendix A-13) and that the County would receive, what to the County was a windfall and to the property owners a forfeiture (Ritter v. Ross, supra at 558 N.W.2d 912), the Court held that procedural due process

did not require giving the Ritters information from which the Ritters could reasonably have concluded the consequences which they did subsequently suffer, the loss of a 35 acre farm with a value in excess of $37,850.00 because of a contested debt of $84.43 and a forfeiture to them, or windfall to the County of more than $37,890.00. With due respect to the Wisconsin Court of Appeals, there can only be one conclusion and that is that it not only was important, but it was imperative to meet the minimum due process requirements, to advise a citizen that if no action was taken, the citizen would forever lose all of his rights to the property and he would forfeit not only his debt of $84.43, but also an amount far greater, a loss of an interest having a value greater than $37,890.00, in order to have

all of the information which would permit a person to make an intelligent decision. This is the cornerstone of the due process requirement to apprise a citizen of the nature of the action and to afford the citizen the opportunity to make an intelligent decision. Mullane v. Central Hanover Bank & Trust Company, supra.

D. Due Process Requirement not Excused Because of Tax Sale.

1. Notice requirements of Memphis Light were not limited to special needs and do apply to deprivation of real property.

The Wisconsin Court of Appeals held that the Petitioners were not owed a notice such as that required in Memphis Light, Gas & Water Div. v. Craft, supra., because the proceeding involved the collection of taxes, and therefore, the notice requirements of procedural due process were "less stringent." Ritter v. Ross, supra, 558 N.W.2d at 914 (Appendix

A-13). The Wisconsin Court of Appeals, while acknowledging that the notice did not comply with the pronouncements of this Court with respect to the requirement of due process as set out in Memphis Light, Gas & Water Div. v. Craft, supra., distinguished Memphis Light on the basis that utility services, unlike the ownership of real estate, were of a greater concern and involved a greater right. Ritter v. Ross, supra, 558 N.W.2d 914.

However, the rule set out in Memphis Light, Gas & Water Div. v. Craft, supra, that notice does not comport with due process requirements where it does not advise the person of the availability and the right to a procedure to protest the deprivation of a property right, is not based upon a special need. While this Court did speak of the value and

necessity of electrical service, it did so in stating that a pre-deprivation hearing was required, an issue not present here because the In Rem proceeding may have, if adequate notice of its role had been given, served as the pre-deprivation hearing. The loss of all interest in a 35 acre farm clearly is a deprivation of a property right, which is the event requiring the type of notice set out in Memphis Light.

2. Tax collection status of action does not lessen notice requirements.

The mere fact that the action by the governmental unit is to collect a tax, contrary to the decision of the Wisconsin Court of Appeals, is not sufficient to excuse compliance with the basic notions of procedural due process. Just as the need to have simplified probate proceedings did not justify the failure

to give personal notice to known claimants in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340 (1988), the need to collect real estate taxes does not, in and of itself, justify avoiding a basic precept of procedural due process. Not only must consideration be given to the governmental interest, but in addition, the private interests affected by the official action and the risk of erroneous or onerous deprivation of the interest are to be considered. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 839 (1976).

When these latter two factors are analyzed in connection with the Wisconsin procedure, the only reasonable conclusion that can be drawn is that where the governmental action will result in complete deprivation of all property

interests regardless of the amount of the tax owed, there can be no relaxation of the basic notice requirements of procedural due process. There are few property rights which are given more significance in the history of the United States than the right to own real property. The right to collect taxes certainly is not superior to the right to own.

E. Conclusion.

Clearly the notice failed to adequately apprise the Ritters that their property could be taken from them and sold to someone else. Rather than providing a notice containing 40 pages of irreverent data, [2] which was not

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[2]The "Notice" referred to a list of 107 properties on 40 pages. The Ritters' property was not listed until page 18 of this list. The "Notice" was not even in compliance with Wis. Stat. §75.521(3)(c) which provides that the entire list was not to be

reasonably calculated to give the notice required by due process, Rock County could have easily added one or more sentences advising the Ritters of the consequences of not taking any action and advising the Ritters of their right to contest whether or not a tax was due. In addition, Rock County could have easily provided specific notice to the Ritters indicating that their property would be taken and that they would have no further interest in the property or in the surplus value of the property over and above the amount of the debt owed the County. Contrary to the opinion of the Wisconsin Court of Appeals, no such notice was required and therefore the opinion is contrary to the decisions of

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attached to the notice, only that part of the list including the taxpayers' parcel.

this Court, including Mullane, Memphis Light and Mathews.

II.

THE RETENTION BY ROCK COUNTY OF THE EXCESS PROCEEDS WAS UNCONSTITUTIONAL

Contrary to the conclusion of the Wisconsin Court of Appeals, the retention of the excess proceeds of the value of the property over the amount of the disputed tax, where there was no right for the taxpayer to recover the excess after a judgment foreclosing the tax lien was entered, is contrary to the holding of this Court in United States v. Lawton, 110 U.S. 146 (1884), and clearly allows an arbitrary confiscation.

This Court, in United States v. Lawton, 110 U.S. 146 (1884), recognized that a statutory scheme which provided no right to recover the surplus proceeds from the government is unconstitutional

and violates the 5th Amendment and the due process requirements of the 14th Amendment. This Court has not, either directly or indirectly, altered this rule. The reliance of the Wisconsin Court of Appeals upon Nelson v. New York, 350 U.S. 103, 77 S.Ct. 195 (1956), as a basis for approving the windfall/forfeiture is misplaced. While it is true that the Court permitted the State of New York to retain the excess proceeds, it did not specifically or indirectly reject United States v. Lawton. The Court in Nelson permitted the retention of the excess proceeds because the New York legislative scheme and the statutes as interpreted by the New York courts, allowed an owner to obtain the surplus proceeds from the judicial sale from the governmental

agency. As the Court stated in Nelson v. New York, supra:

> [W]e do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale. The New York law has been interpreted so as to allow the owner an opportunity to recover the excess/surplus from the state.

The procedure as set out in Wisconsin Statutes Chapter 75 as adopted by the County, did not present the Petitioners, nor any other owner, such an opportunity. Only by paying the amount of the tax before the hearing in the In Rem proceeding, could the property owner redeem his property. Once the tax lien is foreclosed, the Wisconsin procedure provides that the County is absolutely entitled to ownership of the land, and once it owned title, it could, without consideration of the excess, keep all the

proceeds. Leciejewski v. Sedlak, 116 Wis.2d 629, 342 N.W.2d 734, 738 (1984).

The Wisconsin Court of Appeals also relied upon several state supreme court decisions as support for its conclusion that there had been no unconstitutional taking. However, these cases are distinguishable. Lawton was not discussed in Kelly v. City of Boston, 348 Mass. 385, 204 N.E.2d 123 (1965) and the question concerning the constitutionality of the taking was not challenged. The only claim made by the property owners in that case was a claim based upon unjust enrichment. In addition, the procedural scheme in Massachusetts also provided for a redemption period after the property was vested in the City and before any sale by the City.

In Colin v. Scheve, 367 A.2d 135 (D.C. Ct.App. 1976), the retention of the

surplus was approved based upon the rule stated in Nelson v. New York. In Colin the property owners had a two year redemption period following the sale of the parcel.

Not only this Court, but the highest courts of several states, have also held that where there is no opportunity after the governmental unit has taken the property to reclaim either the property or the excess proceeds or where there is not an adequate redemption period following the foreclosure of the lien, the retention of the surplus proceeds is condemned by the procedural due process requirements. United States v. Lawton, supra.; Bogie v. Town of Barnet, 129 Vt. 46, 270 A.2d 898 (1970); and City of Anchorage v. Thomas, 624 P.2d 271 (Alaska 1981).

In City of Anchorage, the Alaska Supreme Court quoted from its decision in Municipality of Anchorage v. Wallace, 597 P.2d 148, 154 (1979) where it interpreted the Alaska statute regarding distribution of the sale proceeds so as to require the distribution of the excess to the taxpayer even though, as in the Wisconsin case, the statute was silent as to distribution of the excess. There the Court commented upon the retention of the excess by stating as follows:

> "The basic injustice of such a situation is obvious." City of Anchorage v. Thomas, 624 P2d 271 at 273 (Alaskan 1979).

It is that basic injustice which has been inflicted upon the Petitioners by the opinion of the Wisconsin Court of Appeals finding that the retention of the surplus proceeds is not a taking of property without due process of law in violation of the 5th Amendment and the

14th Amendment of the United States Constitution. That taking is shocking to the universal sense of justice and constitutes a denial of fundamental fairness, in violation of the 5th Amendment and the Due Process clause of the 14th Amendment.

III.

FAILURE TO AWARD ATTORNEY FEES UNDER 42 U.S.C. §1988 BECAUSE ACTION IS NOT INTENTIONAL IS CONTRARY TO PREVAILING LAW

Although the Wisconsin Court of Appeals did not address the issue of the recovery of attorney fees pursuant to the Civil Rights Act, 42 U.S.C. §1988 because it found there was no violation, the denial of attorney fees by the trial court based solely on its findings that the Defendants did not have the intent to violate the constitutional protected rights of the Petitioners, is contrary to long-established decisions of this Court

and others, including Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983). Section 1988 does not require intent as a prerequisite to an award of attorney fees. That section simply requires that an individual prevail in a suit enforcing civil rights. In fact, there is a presumption that attorney fees are appropriate. Bialk v. Milwaukee County, 180 Wis.2d 374, 388, 509 N.W.2d 334, 337 (1993).

The trial court found that the taking of the surplus over $84.43 was a taking without just compensation in violation of the 5th Amendment of the United States Constitution. In substance, the Ritters recovered under Section 1983 for violation of their constitutionally protected rights, yet the trial court denied attorney fees simply because the violation was not

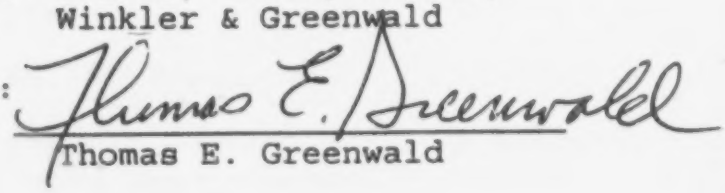
intentional. The denial of those fees on that basis was not justified and was clearly contrary to law.

Respectfully submitted,

Petitioners,

ELMER RITTER and HELEN RITTER,

By: Oliver, Close, Worden, Winkler & Greenwald

By: 
Thomas E. Greenwald

Thomas E. Greenwald
Ann T. Dempsey
OLIVER, CLOSE, WORDEN,
WINKLER & GREENWALD
P.O. Box 4749
Rockford, IL 61110-4749
Telephone (815)968-7591

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PEGGY S. ROSS, County Treasurer for Rock County, Wisconsin, and ROCK COUNTY, a body politic in the State of Wisconsin,

Respondents.

Petition for Writ of Certiorari
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Thomas E. Greenwald*
Ann T. Dempsey
Oliver, Close, Worden,
Winkler & Greenwald
124 N. Water St., Suite 300
P.O. Box 4749
Rockford, IL 61110-4749
Telephone (815) 968-7591

*Counsel of Record

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STATE OF WISCONSIN
CIRCUIT, COURT, BRANCH 7 ROCK COUNTY

ELMER RITTER and
HELEN RITTER,

Plaintiffs,

vs. Case No. 91-CV-480

PEGGY S. ROSS, County Treasurer
for Rock County, Wisconsin, and
ROCK COUNTY, a body politic in
the State of Wisconsin,

Defendants.

ORDER FOR JUDGMENT

THIS CAUSE, came before the Court on the 2nd day of November, 1994, for a decision following a jury trial on September 29 and 30, 1994, and Thomas E. Greenwald and Ann T. Dempsey, appearing on behalf of the Plaintiffs, ELMER RITTER

and HELEN RITTER, (hereinafter the "Ritters") and Eugene R. Dumas, Rock County Deputy Corporation Counsel, appearing on behalf of the Defendants, PEGGY ROSS and ROCK COUNTY, and the jury, having entered a verdict and the Court having heard arguments of counsel and being fully advised in the premises makes the following findings of fact and conclusions of law:

Findings of Fact

1. Ritters' compliance with notice requirements in a related federal matter met any requirement to notify the Wisconsin Attorney General of this case.

2. Ritters did not present a claim to the Clerk of Rock County or any person performing the duties of the Clerk, in accordance with Sec. 893.80, Wis. Stats., prior to commencing this action.

3. That on or about July 14, 1989, Defendant Peggy Ross caused to be filed Rock County Case No. 89-CV-473, entitled, In the Matter of Foreclosure of Tax Liens Pursuant to Section 75.521 Wisconsin Statutes by Rock County, List of Tax Liens for 1989, No. 6.

4. That Defendants gave fair, reasonable and adequate notice to the Ritters of the in rem tax lien foreclosure proceedings pending in Case No. 89-CV-473, in the manner provided by Sec. 75.521, Wis. Stats.

5. The Ritters did receive said Notice of Commencement of Proceedings In Rem to Foreclose Tax Liens by Rock County, but did not redeem their subject real estate nor answer or appear in those proceedings.

6. On or about October 30, 1989, Rock County obtained a tax lien foreclosure judgment on List of Tax Liens for 1989, No. 6 in Rock County Case No. 89-CV-473, which judgment, inter alia, vested Rock County with an estate in fee simple absolute in the Ritter property.

7. At the time Rock County acquired title to the Ritter property, there was in full force and effect a Conservation Reserve Program Contract relating to said property between Commodity Credit Corporation and the Ritters, pursuant to which the Ritters were entitled to receive payment in the amount of $2,880.00 per year through July, 1997.

8. That the 1984 real estate taxes on the Ritter property were not paid.

9. That the unpaid obligation was in the amount of $84.43.

10. That Rock County was attempting to foreclose on a tax lien certificate in the amount of $84.43, based on the unpaid 1984 real estate taxes, at the time Rock County took title to the Ritters' property.

11. That the assessed value of the Ritters' property on the day of the taking was $17,100.

12. Rock County sold the Ritter property to a third party and received payment in the amount of $17,345.00

13. Rock County did not obtain an appraisal of the Ritter property before the sale to the third party.

14. The formula contained in Wis. Stats. Sec. 75.521 would convert to a

value of $17,720.73 for the subject property.

15. Rock County retained excess funds from the sale over the obligation of the Ritters in the amount of $17,260.00

16. Pursuant to the verdict of the jury, the Ritters' real property had a fair market value of $37,890.00 at the time Rock County took the property from the Ritters.

17. The Notice of Commencement of Proceedings In Rem to Foreclose Tax Liens By Rock County sent to the Ritters did not notify the Ritters that Rock County would be attempting to take and keep property in excess of $84.43.

18. The property taken by Rock County in excess of $84.43 was taken without notice to the Ritters and without

any reasonable opportunity for the Ritters to make a claim as to the excess or to defend themselves against the taking of that excess value of property.

19. That Rock County applied the $17,345.00 it received to the real estate taxes claimed due and owing on said real property by the Ritters and retained all the surplus funds.

Conclusions of Law

A. The present action is not barred by the Ritters' failure to provide Rock County with notice provided under Sec. 893.80, Wis. Stats. for the following reasons:

1) Section 75.521(14a), Wis. Stats. is a more specific statute which provides a right to bring an action

within a two-year period and does not have any provision for giving notice of the intent to bring that action;

2) Rock County had actual notice during the relevant period of time of the Ritters claim that the 1984 real estate taxes were paid; and

3) Rock County was not prejudiced by the Ritters failure to provide notice under Section 893.80, Wis. Stats.

B. The present action is not barred by the Ritters' failure to serve the Wisconsin Attorney General with a copy of the summons and complaint in this

case because the Ritters took steps to give notice to the Wisconsin Attorney General in a related federal proceeding which involves substantially the same claims.

C. Rock County violated Wisconsin Statutes §75.69 by failing to obtain the appraised value of the real property taken from the Ritters prior to selling said property to a third party.

D. Rock County's failure to follow Wisconsin Statutes §75.69 damaged the Ritters to the extent that the real property was sold for less than its appraised value and the Ritters were entitled to receive the excess proceeds from said sale.

E. Rock County was unjustly enriched by the retention of the proceeds from the sale of the Ritters' real

property to the extent that the sale proceeds exceeded the tax lien certificate in the amount of $84.43.

F. Rock County and Peggy Ross provided the Ritters with notice prior to taking the Ritters' real property which notice met the constitutional requirements of due process to notify the Ritters of the pendency of the foreclosure proceedings.

G. The notice sent by Rock County and Peggy Ross to the Ritters did not notify the Ritters that Rock County would be attempting to take and keep the property in excess of $84.43
and said surplus property was taken without notice adequate to meet due process requirements.

H. Rock County and Peggy Ross misinterpreted the Wisconsin Statutes

when they failed to provide the Ritters with notice that the Ritters' property in excess of the amount of tax lien certificate would be taken and retained by Rock County.

I. The taking of the Ritter property in excess of $84.43 by Rock County and Peggy Ross was a taking without just compensation in violation of the Fifth Amendment of the United States Constitution.

J. Ritters are not entitled to recover reasonable attorney fees under 42 USC §1988, because Rock County and Peggy Ross did not have the intent to, or with malice, violate the Ritters' constitutional rights or 42 USC §1983.

K. Ritters are not entitled to recover damages for loss of future income from the property under the Conservation

Reserve Program Contract.

WHEREFORE, IT IS HEREBY ORDERED that judgment shall be entered in favor of the Plaintiffs, ELMER RITTER and HELEN RITTER, and against Defendants, ROCK COUNTY and PEGGY ROSS, jointly and severally, in the amount of $37,835.57, plus costs. All other claims of the Plaintiffs are hereby dismissed on their merits.

Dated this 17th day of May, 1995.

BY THE COURT:

_____

HON. JAMES E. WELKER, Circuit Judge

PREPARED BY:

THOMAS E. GREENWALD #01013709
ANN T. DEMPSEY #01001654
OLIVER, CLOSE, WORDEN, WINKLER,
GREENWALD & MAIER
124 North Water Street, Suite 300
Post Office Box 4900
Rockford, IL 61110-4900
Telephone: 815/968-7591
Telefax: 815/968-7507

COURT OF APPEALS
DECISION
DATED AND RELEASED

NOTICE

December 12 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See §808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1941

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT IV

ELMER RITTER, and HELEN RITTER,

Plaintiffs-Appellants-Cross Respondents,

v.

PEGGY S. ROSS, County Treasurer for Rock County, Wisconsin, and ROCK COUNTY, a Body Politic in the State of Wisconsin,

Defendants-Respondents-Cross Appellants.

APPEAL from a judgment of the circuit court for Rock County: JAMES E. WELKER, Judge. Reversed and remanded with directions.

Before Eich, C.J., Dykrnan, P.J., and Vergeront, J.

EICH C.J. Elmer and Helen Ritter sued Rock County and its treasurer, Peggy Ross,[1] seeking to void a tax foreclosure and sale of a parcel of nonhomestead property they owned in the County and to recover monetary damages and attorney fees on several theories. The County began the foreclosure proceedings when a tax arrearage of $84.43 on the Ritters' property remained unpaid for several years. The Ritters did not defend the action and, after obtaining a foreclosure judgment, the County sold the property to a third party for $17,345, retaining the entire amount of the sale proceeds.

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[1]Unless otherwise required by the text, we refer to the defendants collectively as "the County."

The Ritters' complaint asserted federal constitutional claims, including a claim for reasonable attorney fees, under the Federal Civil Rights Act, 42 U.S.C. §§ 1983 and 1988, a claim for violations of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendments, as well as state-law damage claims for unjust enrichment—all based on the County's retention of the sale proceeds. They also sought damages for loss of future profits from the land, i.e., anticipated federal agricultural subsidies.

The trial court ruled that, although the County's notice of the foreclosure proceedings met due process standards insofar as it notified them of the pendency of the in rem foreclosure action, it was constitutionally

inadequate for failing to apprise them of the possibility that the County would take the entire parcel in satisfaction of a comparatively small tax lien. The court also held that the County's action amounted to a taking of the Ritters' property without just compensation in violation of the Fifth Amendment. It dismissed their claim for attorney fees under 42 U.S.C. § 1988, however, because they failed to establish that Ross or the County had intentionally or maliciously denied their constitutional rights. Finally, the court ruled that (1) the County's failure to obtain an appraisal of the Ritters' property prior to the sale violated § 75.69, STATS., which states that a county may not sell tax-delinquent property unless the sale and the "appraised value" of the property

have first been advertised by publication; and (2) the Ritters did not have a valid claim for damages for loss of future profits from the land.

Having so ruled, the court concluded that the County had been unjustly enriched by retaining the sale proceeds over and above the Ritters' tax liability, and ordered that judgment be entered for the Ritters in the sum of $37,835.57, which represented the fair market value of the property at the date of the sale, less the $84.43 tax lien.

While the parties raise a variety of

issues on the appeal and crossappeal,[2] we consider the constitutional issues to be dispositive: whether the Ritters are entitled to relief under the Due Process and Takings Clauses of the Constitution based on the manner in which the County proceeded in foreclosing the tax lien and selling the property. We hold that they are not. We therefore reverse the judgment and remand to the

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[2]The Ritters argue that the trial court erred in (1) refusing to award attorney fees under the Civil Rights Act for the constitutional violations; (2) dismissing their claim for future damages; and (3) ruling that the notice of the pendency of the foreclosure proceedings was adequate under the Due Process Clause. On its cross-appeal, the County maintains that (1) the Ritters' action must be dismissed for their failure to follow the notice-of-claim provisions of § 893.80, STATS.; (2) the County did not violate the "appraised value" provisions of § 75.69, STATS.; and (3) all applicable statutory and constitutional notice requirements were met.

trial court with directions to enter judgment dismissing the Ritters' action.[3]

I. Background

Helen Ritter, who was a licensed real estate broker/salesperson in Illinois and Wisconsin for approximately thirty years, and her husband, Elmer, purchased sixty-eight acres of

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[3]Because we reject the Ritters' arguments that the County's actions were constitutionally improper, we need not consider the claim for attorney fees under 42 U.S.C. §§ 1983 and 1988. Nor, for the same reasons, need we consider the County's claim that the Ritters' failure to comply with the notice-of-claim provisions of § 893.80, STATS, also requires dismissal of their action.

As to the trial court's determination that the County's failure to have the property appraised before the sale violated § 75.69, STATS. (requiring that foreclosed property be sold for its "appraised" value), which the County has cross-appealed, any such failure on the County's part can have no effect on the Ritters' rights because, as we have held, they are not statutorily or constitutionally entitled to the proceeds. Similarly, absent any valid claim to the surplus proceeds, the Ritters can have no triable claim for unjust enrichment. *Oosterwyk v. Milwaukee County,* 31 Wis.2d 513, 517, 143 N.W.2d 497, 499, *cert. denied,* 385 U.S. 981 (1966).

undeveloped land in Rock County in 1982, selling off some and retaining approximately thirty-eight acres for themselves.

In early 1985, the Ritters received a statement of 1984 real estate taxes due on the property from the treasurer's office. The notice was in the standard form, containing information on the property and its assessment, the amount due and a warning that delinquent taxes would be subject to interest and penalties. It stated that the Ritters' bill of $710.03 could be paid in two installments of $355.02 and $355.01, on February 28 and July 31, 1985, or in full by February 28. It is undisputed that Helen Ritter paid the first installment, but the facts surrounding payment of the second are not as clear.

Helen Ritter testified that she mailed a money order for the second installment to the County in July 1985. She also stated that, several months later, she received notice from the County that the taxes had not been paid, so she purchased another money order and mailed it to the County. She corresponded with the County regarding its nonreceipt of the second installment, but she responded to the County's repeated requests for payment by simply mailing a photocopy of the purported second-installment money order to the treasurer's office. At some point in mid-1988, she also created a "ledger"-type form showing the payment, and sent that as well.

This went on for several years, until County Treasurer Peggy Ross wrote

to the Ritters on December 15, 1988, as follows:

> We are not sure what you are trying to tell us .... According to our records you still owe taxes back to 1984.
>
> The County will be taking this property because of back taxes.
>
> If your records show that they are paid, please bring to [our] office or send copies of the receipts. Our records do not show any of the payments that you have noted ....

The Ritters responded by sending still more photocopies of their "ledger" and the money order. Several days later, Ross again wrote to the Ritters explaining how the payments received in the treasurer's office had been applied

since 1985,[4] and stating that taxes remained delinquent on the property in the sum of $84.43. The letter concluded:

> It is very important that you personally come in and bring your receipts showing that you have paid the 1984's. Your receipts showing copies of your money orders [are] of no help.

Elmer Ritter responded by returning the letter to Ross with a handwritten note in the margin stating: "All I have here is receipts of payments mailed Rock Cty. Treas." Then, several months later, in January 1989, Helen Ritter sent a note to Ross indicating that, in past years, she had mailed photocopies of a money

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[4]In the months and years this exchange of delinquency notices and correspondence was occurring, the Ritters paid current tax bills on the property as they came due. The County apparently applied some of those payments to the $355.01 "delinquent balance," including interest, on the Ritters' 1984 taxes, leaving, as indicated, a balance of $84.43 as of mid-1988.

order and ledger sheet to Ross, and enclosed another copy of each.

On July, 14, 1989, the County sent the Ritters a document entitled "NOTICE OF COMMENCEMENT OF PROCEEDINGS IN REM TO FORECLOSE TAX LIENS BY ROCK COUNTY." The notice, which was sent to landowners in Rock County, including the Ritters, against which tax liens had been filed, indicated the amount of each owner's lien and stated that judicial proceedings were being instituted to "foreclose" them. The notice concluded by stating that the liens could be redeemed by paying the delinquent amount to the treasurer by September 27, 1989. Attached to the notice was a copy of the petition filed with the court, stating that the County was seeking judgment "vesting title [of all such lands] in the county ... and

barring any and all claims whatsoever of the former owner(s) ...." The entry under the Ritters' name listed the property in question and showed a lien in the amount of $84.43 for unpaid 1984 real estate taxes.

Neither Helen Ritter—who understood that unpaid or underpaid real estate taxes could lead to foreclosure—nor Elmer Ritter responded to the notice or appeared in any way in the proceedings. In October 1989, judgment was entered vesting title to their property in the County on the basis of the unpaid 1984 taxes. As indicated, the County sold the property for $17.345. The County applied the proceeds of the sale to the taxes

due, retaining the surplus,[5] and this action followed.

II. The Takings Clause

The trial court concluded that the County's retention of the proceeds from the Ritters' property in excess of $84.43 amounted to an unconstitutional taking of their property without just compensation in violation of the Fifth Amendment to the

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[5]As we discuss in greater detail in Part III, the collection of delinquent property taxes is governed by chapter 75, STATS. Section 75.521 gives counties the authority to foreclose property tax liens through in rem judicial proceedings when taxes remain unpaid for more than three years. A foreclosure judgment under chapter 75 gives the county a tax deed, vesting it with fee simple title to the property. *Leciejewski v. Sedlak*, *116* Wis.2d 629, 638, 342 N.W.2d 734, 738 (1984). A tax deed is not derivative but creates new title in the county which "foreclos[es] all rights, titles, interests, liens, and claims in the property ... subject to the foreclosure." *Id.* at 639, 342 N.W.2d at 739. Once it receives the deed, the county may sell the property for the "most advantageous" bid. Section 75.69(1).

United States. We review constitutional issues de novo without deference to the trial court's decision. In re *Barthel*, 161 Wis.2d 587, 592, 468 N.W.2d 689, 691 (1991).

To maintain a claim under the Takings Clause, the plaintiff must have an interest in the property that is alleged to have been taken by the government. *United States v. Dow*, 357 U.S. 17, 20 (1958). We thus consider whether the Ritters had a property interest in the excess proceeds of the foreclosure sale, because that is the "property" they claim was unconstitutionally taken by the County.

Cases considering constitutional challenges to state tax foreclosure sales generally conclude that a taxpayer has a recognizable interest in the

excess proceeds from such a sale only if the state constitution or tax statutes create such an interest. In *Spurgias v. Mornsette*, 249 A.2d 685, 687 (N.H. 1969), for example, the New Hampshire Supreme Court stated, "In the absence of contrary provision by statute or constitution, a municipality's title to such property is absolute so that a town is free from either legal or equitable claims by the taxpayer to any surplus realized." (Citations omitted.) In *Nelson v. New York*, 352 U.S. 103 (1956), the United States Supreme Court rejected a claim under the Takings Clause when the municipality sold the plaintiff's property for $7000—to satisfy a $65 tax delinquency—and retained the proceeds. The Court concluded that "nothing in the Federal Constitution prevents this where

the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."[6] Id. at 110; see also *Coleman v. Scheve*, 367 A.2d 135 (D.C. Ct. App. 1976); *Kelly v. City of Boston*, 904 N.E.2d 123 (Mass. 1965); *City of Auburn v. JIandarelli*, 320 A.2d 92 (Me. 1974).[7]

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[6]The Ritters argue to the contrary, maintaining that *United States v. Lawton*, 110 U.S. 146 (1884), and *Bogie v. Town of garnet*, 270 A.2d 898 (Vt. 1970), require the taxing entity to return the surplus from the foreclosure sale to the taxpayer under the Takings Clause. We disagree. *Lawton* and *Bogie* are distinguishable because in both cases the Court determined that the statutory framework of applicable state tax legislation required any excess proceeds to be returned to the taxpayer. Indeed, in *Nelson*, the Court distinguished *Lawton*—a case it decided seventy years earlier—on that very basis. *Nelson, 352 U.S.* at 109-10.

[7]The *Auburn* court noted that the Supreme Court has affirmed at least two federal district court cases holding to the same effect. See, e.g., *Catoor v. Blair*, 358 F.Supp. 815 (N.D. Ill.), aff'd, 414 U.S. 990 (1973) (per curiam); *Balthazar v. Mari, Ltd.*, 301 F.Supp. 103 (N.D. Ill.), aff'd, 396 U.S. 114 (1969) (per curiam); see generally *Bender v. City of Rochester*, 765 F.2d 7 (2d Cir.1985).

Thus, when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements.[8] We have not been referred to any applicable provision of the Wisconsin Constitution, and we see nothing in chapter 75, STATS., either directing or relating in any way to distribution of surplus funds after a tax

[8]We consider the Ritters' due process claims in Part III of this opinion.

sale.[9] Indeed, the Wisconsin Supreme Court, in *Oosterwyk v. Milwaukee County*, 31 Wis.2d 513, 143 N.W.2d 497, *cert. denied*, 385 U.S. 981 (1966), upheld Milwaukee County's retention of a $12,000 tax-sale surplus against various state-law challenges, stating that, even though a municipality, may benefit by retaining the surplus, when it acquires fee-simple title to property via a tax deed and sells it, "[the] owner ... is

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[9]With respect to homestead property, since 1987, § 75.36, STATS., has required distribution of tax-sale surplus to the owner if the property had been used as a homestead within five years of the foreclosure. 1987 Wis. ACTS 378, §§ 120, 122. The Ritters contend that this change in the statute "should be interpreted as an implicit recognition by the legislature that the County never had the right to retain excess property under the statutes." We disagree. First, there is no claim here that the Ritters ever used the foreclosed property as a homestead. Second, if the legislature had intended to mandate the distribution of excess proceeds for *all* property foreclosures, rather than just homestead property, it would have amended under § 75.521 as well—which, of course, it did not.

not entitled to any surplus unless the legislature chooses to provide therefor." Id. at 517, 143 N.W.2d at 409.

We conclude that, under *Spurgias, Nelson,* and similar cases, the Ritters' claim under the Takings Clause resolves into a question of the adequacy of the County's notice under traditional due process considerations.

III. Adequacy of the County's Notice

A. Notice of the Pendency of the Action

As indicated above, the trial court concluded that the notice of the commencement of the foreclosure proceedings was constitutionally adequate, and the Ritters challenge that ruling on appeal.

Due process is a "flexible concept" that requires only such procedural protections "as the particular situation

demands." *Estate of Wolff v. Town Bd.*, 156 Wis.2d 588, 594, 457 N.W.2d 510, 512 (Ct. App. 1990). It is a concept that must give "due regard for the practicalities and peculiarities of the case" at hand. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

Section 75.521(3), STATS., governs the commencement of foreclosure proceedings. Under its provisions, the treasurer first files a list of properties "affected by unpaid tax liens" with the clerk of circuit court. Section 75.521(3)(a). The list must include descriptions of each parcel "sufficient to identify" them and include the owners' names and the amount of the lien on each property. Section 75.521(a)(4)(am). The filing of the list is deemed to

constitute the commencement of a foreclosure proceeding against each listed parcel. Section 75.521(3)(b). A "copy of the petition and so much of the list of tax liens as shall include the description of a particular parcel" must then be sent by certified or registered mail to "each ... owner of record," and any other person or entity having an interest in the land or the tax liens. Section 75.521(3)(c). At the time the list is filed with the court, the county must publish a public notice of the commencement of the proceeding with identifying information and notice of the right to redeem the liens within a specified period of time. Section 75.521(6). The statute specifies the language the notice must contain.

Succeeding subsections of § 75.521,

STATS., describe the property owners' rights, including the right to redeem the liens or "be forever barred and foreclosed of all ... right, title and interest in and to the [described] parcel" as well as the owners' rights to challenge the foreclosure in various respects.

Section 75.521(5), (7).

The Ritters do not challenge the County's compliance with the procedural requirements of §75.521(3), STATS. They acknowledge receiving all of the materials the statute requires. Their argument is that the notices are nonetheless constitutionally inadequate for failing to advise them of the provisions of §75.521(7) relating to their right to file an answer to the foreclosure petition.

They begin by referring us to *Memphis Light, Gas & Water Division v. Craft*. *436 U.S. 1*, 14-15 (1978), where the Supreme Court held that due process required utility companies to notify customers of the opportunity to contest disputed bills before their service could be terminated. The Court makes clear, however, that it considered the termination of utility service to be a special situation because of the health and safety concerns that accompany cessation of heat, light and water services. *Id.* at 14 n.15, & 18. The court noted in that regard, for example, "In a different context a person threatened with the deprivation of a protected interest need not be told 'how to complain."' *Id.* at 14 n.15. We are not at all persuaded that *Memphis Light* requires

such expanded notice with respect to a tax sale of real estate such as the Ritters'.

Indeed, the Wisconsin Supreme Court recognized in *Chicago & North Western Transportation Co. v. Pedersen, 80* Wis.2d 566, 572-73, 259 N.W.2d 316, 319 (1977), that the notice requirement for an in rem proceeding for collection of property taxes is "less stringent" than that required in lawsuits generally.'[10] Specifically addressing due process requirements in the context of a notice of foreclosure sale under § 75.521, STATS., the court stated:

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[10]*Pedersen* involved, among other things, a challenge to the notice provisions of a law providing for the loss of mineral rights in land. The case relied on by the *Pedersen* court for the quoted proposition, however, *Devitt v. Milwaukee,* "61 Wis. 276. 52 N.W.2d 872 (1952), involved, as we note above, a real-estate tax foreclosure proceeding under § 75.521, STATS.

> "As applied to the proceedings for the levy and collection of taxes, due **process 'does not imply** or require the right to such notice and hearing as are deemed essential to the validity of the proceedings and judgments of judicial tribunals.'... The process of taxation .... involves no violation of due process of law, when it is executed according to customary forms and established usages ...."

Devitt v. City of Milwaukee, 261 Wis. 276, 279, 52 N.W.2d 872, 873 (1952) (quoted sources omitted).

We note, too, that the subsection to which they refer, §75.521(7), STATS., is more a limitation on the general right to answer a complaint or petition than it is a grant of special rights. It states, for example, that any person with an interest in or

lien upon one of the parcels listed in the petition may answer and object to foreclosure "upon one or more of the

following grounds only": (1) the property was not subject to taxation; (2) the taxes were timely paid; or (3) the tax lien is barred by the statute of limitations. Sections 75.521(7)(a)1-3. The statute goes on to state, "No other defense ... shall be set up" to the petition. Section 75.521(7)(b).

More importantly, the notices required under §75.521, STATS., for commencement of foreclosure proceedings—notably those found in §75.521(3)(c)— were specifically upheld against a due process challenge in *Devitt*, 261 Wis. at 284, 52 N.W.2d at 876. Important to the court's holding in that case was its recognition that, long before the process reaches this stage,

> other statutes have provided for notice to the taxpayer of assessment; opportunity to examine the tax rolls;

> time and place of hearing before the board of review; time, place and method of payment; delinquency; sale; time limitation for redemption, etc.... Such notice is sufficient to satisfy the requirements of due process.

Id. at 278, 51 N.W.2d at 873. The record in this case indicates that here, as in *Devitt*, all the i's were dotted, and all the t's crossed."[11]

We therefore agree with the trial

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[11]The Ritters also argue that the notice of foreclosure they received failed to comply with § 75.521(3)(C), STATS., because, while: the statute says that the owner should receive, along with the petition, "so much of the list of tax liens as shall include the description of a particular parcel," the list they received included many other parcels besides their own. Their argument boils down to this: sending them more pages of the foreclosure list than was required constitutes noncompliance with § 75.521(3)(C). We agree with the Ritters that taking of land by the government for failure to pay property taxes is a "very drastic measure," requiring strict compliance with statutory procedures, *Waukesha County v. Young*, 106 Wis.2d 244, 249, 316 N.W.2d 362,365 (1982), but we do not think sending the full list violates either the letter or the spirit of § 75,521(3)(C).

court that the notices received by the Ritters were reasonably calculated to apprise the Ritters of the pendency of the foreclosure action, afforded them an opportunity to present their objections and were thus constitutionally adequate.

B. Notice of Possible Retention of Surplus Sale Proceeds

The County's cross-appeal challenges the trial court's conclusion that the Ritters' due process rights were violated because the County's notices failed to specifically advise them that any surplus proceeds from the foreclosure sale of their property were subject to possible retention by the County. We think the County's arguments are well taken, and we reverse on this issue.

We have just outlined the many

notices provided delinquent property taxpayers along the path from delinquency to foreclosure. For the Ritters those procedures began in 1985 with the notice that payment of the second half of their 1984 taxes had not been received. Correspondence between the Ritters and the County regarding the delinquent payment continued from 1985 until late 1988. Then, in December 1988, the Ritters were advised that, because of the 1984 delinquency, the County would be "taking th[eir] property," and that it was "very important" that they come to Ross's office to cure the problem. When the Ritters did nothing in response, except mail another copy of the money order and ledger in January 1989, the proceedings were commenced, pursuant to statutory

notice, in July 1989.

In *Devitt*, the supreme court noted that, as a result of these and the many other applicable statutory procedures, a taxpayer, exercising "reasonable diligence in the preservation of his [or her] interests," is apprised of every significant detail of the process, from the assessment to the levy, and from collection to foreclosure. *Devitt, 261 Wis.* at ?80, 52 N.W. at 874. As a result, said the court, "it has been uniformly held that tax statutes may adopt a procedure summary in nature and that notice of such proceedings need not be more than reasonably adequate to afford the owner an opportunity to protect his property." Id.

There is no statutory requirement

for a notice such as that argued by the Ritters, nor are we persuaded that due process requires such a notice. New York's highest court rejected such a claim in *Sheehan v. County of Suffolk*, *490* N.E.2d 523, 525 (N.Y.), *cert. denied*, *MacKechnie v. County of Sullivan*, 478 U.S. 1006 (1986), holding that "[t]here is no unfairness, much less a deprivation of due process, in the county's retention of any surplus" from a property tax foreclosure sale. The court began its analysis with the "well-settled proposition" that property owners are charged with knowledge of the laws affecting their property. *Id.* It went on to state: "Due process does not require that every taxpayer be advised of the possible consequences attaching to a default in payment. Once taxpayers are

provided with notice and an opportunity to be heard on the adjudicative facts ... they have received all the process that is due." *Id.* (citations omitted).

We follow a similar rule in Wisconsin. In *State v. Iglesias,* 185 Wis.2d 117, 143, 517 N.W.2d 175, 184, *cert. denied,* 115 S. Ct. 641 (1994), for example, the supreme court said, "'It is well established that persons owning property within a State are charged with knowledge of relevant statut[es] affecting the control or disposition of [their] property.'"[12] (Quoted source

[12]The supreme court has also said, "'It is deemed that every person is bound to know the law, and to take notice of what is transpiring in the courts, from the time when the process is served and the complaint filed until the final judgment is entered.'" *Belleville State Bank v. Steele,* 117 Wis.2d 563, 571 n.5, 345 N.W.9d 405, 409 (1984) (quoting *Brohn* v. *Cohn,* 95 *Wis.* 90, 93, 69 N.W. 71, 72 (1897)).

omitted.) As the court noted in *Devitt*:

> When an individual acquires real estate he is presumed to know what the law provides with respect to the taxation and condemnation of land. If he exercises reasonable diligence in the preservation of his interests, he is apprised of tax assessments, the time, place and manner of payment, etc. If he has not sought to protect his property against the lien of delinquent taxes, it is subject to the final step in the ... procedure of collection, foreclosure. Consequently, it has been uniformly held that tax statutes may adopt a procedure summary in nature and that notice of such proceedings need not be more than reasonably adequate to afford the owner an opportunity to protect his property.

Devitt, 261 Wis. at 280, 52 N.W.2d at 874; *see Waukesha County v. Young*, 106 Wis.2d 244, 250-51, 316 N.W.2d 362, 365 (1982).

After failing to take advantage of numerous opportunities to remedy their

default over a three-year period, the Ritters finally received notice of the foreclosure proceedings—and in the course of that notice were told of their right to avoid the sale by redeeming the $84.43, and the serious consequences of a failure to do so; yet they continued to do nothing.

We have noted above that the "flexible" nature of due process requires only such notice as may be demanded under the particular circumstances of the case. *Estate of Wolff* 156 Wis.2d at 594, 457 N.W.2d at 511. Notice of the foreclosure and sale of property has been held adequate under the Due Process Clause if is "reasonably adequate to afford the owner an opportunity to protect his property." *Devitt*, 261 Wis. at 980, 52

N.W.2d at 874. Considering *Sheehan*, *Devitt* and similar cases, we conclude that due process does not mandate that the foreclosure notices required by §75.521 also state the possibility that, should the tax lien be foreclosed and the property sold, the municipality might elect to retain any surplus proceeds from the sale over and above the amount of its lien.

Because the County's notices satisfied applicable due process requirements, the Ritters' challenges to the foreclosure proceedings must fail.

By the Court.—Judgment reversed and remanded with directions.

Recommended for publication in the official reports.

Office of the Clerk
SUPREME COURT

110 EAST MAIN STREET, SUITE 715
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640

To:

June 10, 1997

Hon. James E. Welker
Rock County Circuit Court
250 Garden Lane 61110-4749
Beloit, WI 53511-6168

Thomas E. Greenwald
Oliver, Close Law Firm
P.O. Box 4749
Rockford, IL 61110-4749

Eugene R. Dumas
Rock Co. Corp. Counsel
51 S. Main Street
Janesville, WI 53545

John J. Prentice
Pierski & Phillips
229 E. Wisconsin, Ste. 703
Milwaukee, WI 53202

You are hereby notified that the Court has entered the following order:

No. 95-1941 Ritter v. Ross
L.C.#91CV480

A petition for review pursuant to Wis. Stat. §808.10 having been filed on behalf of plaintiffs-appellants-cross respondents-petitioners, Elmer Ritter and Helen Ritter, and considered by the court,

IT IS HEREBY ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

Wisconsin Statutes 75.521(3)

COMMENCEMENT OF PROCEEDING TO FORECLOSE TAX LIEN.

(a) Whenever any land has been included in a tax certificate, the treasurer may file in the office of the clerk of the circuit court of the county, one or more lists of parcels of property affected by unpaid tax liens as shown on the tax certificates in the treasurer's office. The treasurer may file the list when any of the following time periods elapses after the date of the tax certificate:

1. One year, if razing, removing and restoration of the site to a dust-free and erosion-free condition costs incurred by any city or village are included in the amount due for taxes.

2. One year, if the tax certificate is held by any city authorized to proceed

under s.74.87 or by any county that has a population of 500,000 or more.

4. Two years, if none of the conditions specified in subds. 1, and 2, applies.

(am) The parcels shall be numbered consecutively in the list prepared under par.(a). The list shall be known as the "List of Tax Liens of...County Being Foreclosed by Proceeding in Rem 19.., No...." and shall bear the following caption:

'STATE OF WISCONSIN
CIRCUIT COURT
...COUNTY

In the matter of the foreclosure of tax liens under section 75.521 Wisconsin Statutes by ....County, List of Tax Liens for 19.., Number ....". The list shall contain as to each parcel, the following:

1. A brief description sufficient to identify each parcel affected by such tax lien. The description shall state the lot, block and section number of any parcel upon any tract, the plat or map of which is filed in the office of the register of deeds of such county. If the lands be unplatted an engineer's metes and bounds description shall be a sufficient description.

2. The name or names of the last owner or owners, and mortgagee or mortgagee of such parcel as such ownership or mortgage interest appears of record in the office of the register of deeds of the county wherein such parcel is situated, and the state of Wisconsin where it has a determined but unpaid inheritance tax lien, a filed, nonoutlawed income tax warrant or a docketed judgment, all in the county where such parcel is situated.

NOTE: Subd.2 is amended by 1987 Wis.Act.27, eff.1-1-92, to read:

"2. The name or names of the last owner or owners and mortgagee or mortgagees of the parcel as the ownership or mortgage interest appears of record in the office of the register of deeds of the county in which the parcel is situated, and the state of Wisconsin if it has a determined but unpaid death tax lien, a filed, nonoutlawed income tax warrant or docketed judgment, all in the county where the parcel is situated."

3. A statement of the amount of the principal sum of each tax lien in the hands of the county treasurer, together with the date from which and the rate at which interest shall be computed on said principal sum.

4. A petition to the court for judgment vesting title to each of said

parcels of land in the county, as of the date of entry of judgment and barring any and all claims whatsoever of the former owner or any person claiming through and under him since the date of filing the list of tax liens in the office of the clerk of the circuit court.

5. The names of all municipalities, other than the foreclosing county, having any right, title or interest in the land or in the tax liens or in the proceeds thereof.

(b) Such list of tax liens shall be verified by the affidavit of the county treasurer and shall be posted in his office. the filing of such list of tax liens in the office of the clerk of the circuit court shall constitute and have the same effect as the filing and recording in the office of the register of deeds of such county of a separate and individual notice of the

pendency of such proceeding as to each parcel described in such list, and likewise, not withstanding any other provision of law, shall constitute the commencement of a special proceeding by the county against each parcel of real estate therein described and have the same effect as the filing of an individual and separate petition or complaint by the county against each parcel of real estate therein described to enforce the payment of the tax liens against such property.

(c) A copy of the petition and so much of the list of tax liens as shall include the description of a particular parcel shall be mailed by registered or certified mail, return receipt requested, by the county treasurer to the last-known post-office address of each owner and mortgagee of record, the state of Wisconsin in the

instances specified in par. (am) 2, and to each municipality, other than the foreclosing county, having any right, title or interest in the land or in the tax liens or the proceeds thereof. An affidavit of the treasurer setting forth the names of the owners, mortgagees, the state of Wisconsin in the proper case and municipalities for whom a post-office address has been ascertained, giving the addresses and stating that notice was mailed, giving the date of mailing, and stating that no present post-office address was ascertained for the other owners and mortgagees, shall be filed and constitute full compliance with this paragraph.

Wisconsin Statutes §75.521(6)

PUBLIC NOTICE OF IN REM PROCEEDING. Upon the filing of such list in the office of the clerk of the circuit court, the

county treasurer forthwith shall prepare a notice that such list of tax liens and petition has been so filed and a copy thereof posted in the office of said county treasurer. The treasurer shall cause such notice, together with the list of tax liens and petition, to be published as a class 3 notice, under ch. 985. Such notice shall be in substantially the following form:

NOTICE OF COMMENCEMENT OF PROCEEDING IN REM TO FORECLOSE TAX LIENS BY .... COUNTY

(Here insert list of tax liens and petition as filed in office of clerk of the circuit court.)

TAKE NOTICE that all persons having or claiming to have any right, title or interest in or lien upon the real property described in the list of tax liens, No...., on file in the office of the clerk of the circuit court of .... county, dated ....,

and hereinabove set forth, are hereby notified that the filing of such list of tax liens in the office of the clerk of the circuit court of .... county constitutes the commencement by said .... county to foreclose the tax liens therein described by foreclosure proceeding in rem and that a notice of the pendency of such proceeding against each piece or parcel of land therein described was filed in the office of the clerk of the circuit court on ... (insert date). Such proceeding is brought against the real property herein described only and is to foreclose the tax liens described in such list. No personal judgment will be entered herein for such taxes, assessments or other legal charges or any part thereof.

TAKE FURTHER NOTICE that all persons having or claiming to have any right, title or interest in or lien upon the real

property described in said list of tax liens are hereby notified that a certified copy of such list of tax liens has been posted in the office of the county treasurer of ... county and will remain posted for public inspection up to and including ... (here insert date at least 8 weeks from the date of the first publication of this notice) which date is hereby fixed as the last day for redemption.

TAKE FURTHER NOTICE That any person having or claiming to have any right, title or interest in or lien upon any such parcel may, on or before said ...(insert redemption final date), redeem such delinquent tax liens by paying to the county treasurer of ...county, the amount of all such unpaid tax liens and in addition thereto, all interest and penalties which have accrued on said unpaid tax lien, computed to and including

the date of redemption.

...County
By...
County Treasurer

Wisconsin Statutes §75.521(14a)

DAMAGES. Any person who was the owner of any right, title or interest in land which was lost by judgment of foreclosure as provided in this section may within 2 years from the date of entry of such judgment, in the cases hereinafter mentioned other than fraud and within 6 years in the case of fraud, commence an action in the circuit court against the county to recover the fair market value of the person's interest therein at the date of entry of said judgment of foreclosure in rem. If the court determines that such person's right, title and interest in said land was unjustly foreclosed and lost because said person's interest in such lands was not subject to

taxation, special assessments, special charge or special tax at the time of the levy of the tax, assessment or charge, for nonpayment of which said lands were foreclosed, or that in fact such tax, special assessment, special charge or special tax was paid by said owner, or that the tax lien upon which the judgment of foreclosure in rem was based was barred by the statute of limitations, or if such person lost said property through fraud without fault on his or her part, the court shall determine the fair market value of said land or of said person's interest therein as hereinabove set forth. The fair market value shall not exceed the amount arrived at by dividing the assessed valuation of such lands in the year in which such judgment in rem was entered by the percentage ratio of real estate assessments

prevailing for the taxing district in which the lands were located as set forth in the equalization for state tax purposes of the same year. The court shall award judgment to such plaintiff in such amount, together with a reasonable attorney's fees to be fixed by the court, and the plaintiff's costs and disbursements of such action. The amount awarded the plaintiff shall be reduced by the total amount due, as of the date of entry of such judgment, for all current taxes and upon all tax certificates held by the county on such date that the court shall find were valid. Upon payment of the judgment the county may charge back as a tax to any taxing district the amount which such district received from the county in payment of taxes and interest on said land either by distribution of proceeds of sale thereof by the county or through other

payment by the county to the extent that it exceeds the amount distributable to such district had the same been based upon the payment of the taxes and interest found by the court to be properly payable at the time of the entry of the judgment of foreclosure and applied in reduction of the amount awarded to the plaintiff hereunder.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the

District of Columbia."

U.S. CONST. amend. V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. XIV §1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Supreme Court, U.S.
FILED
OCT 10 1997
CLERK

(2)

No. 97-435

In The

Supreme Court of the United States

October Term, 1997

ELMER RITTER and HELEN RITTER,

Petitioners,

v.

PEGGY S. ROSS, County Treasurer for Rock County, Wisconsin, and ROCK COUNTY, a body politic in the State of Wisconsin

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Wisconsin, District IV

RESPONDENTS' BRIEF IN OPPOSITION

EUGENE R. DUMAS
Counsel of Record
Deputy Corporation Counsel
County of Rock
51 S. Main Street
Janesville, WI 53545
(608) 757-5530

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Peggy S. Ross and Rock County, by their undersigned counsel, respectfully request that this Court deny the Petition for Writ of Certiorari to the Court of Appeals of Wisconsin, District IV, seeking review of the Decision and Order of the Court of appeals in this case.

COUNTERSTATEMENT OF THE CASE

A. The Petitioners misrepresent how Rock County came to foreclose the tax lien for delinquent taxes on petitioners' former land.

1. Petitioners failed to pay real estate taxes assessed against their property despite receiving numerous notices and communications from the County urging them to do so or provide documentation that they had already done so.

The history of this case is not what petitioners would have it seem. The petitioners, Elmer and Helen Ritter (hereinafter "petitioners" or "Ritters"), declare to this court that "[o]n October 30, 1989, . . . [petitioners] . . . lost their 35 acre farm for the *alleged* failure to pay $84.43 in property taxes. . . . " Petition at 4. The petitioner's claim thus appears to be that they had, in fact, paid their taxes and, through no fault of their own, have been deprived of their property by an errant bureaucracy. This was their posture when they sought to go directly into federal court, unsuccessfully trying to short-circuit Wisconsin's approach to processing such tax disputes. See Petition, fn

1 at 1-3; *Ritter v. Ross*, 992 F.2d 750, 751 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 694, 126 L.Ed.2d 661 (1994). Respondents, Peggy S. Ross, as County Treasurer for Rock County, and Rock County (hereinafter "Rock County," or "the County") were responsible for administering the collection of real estate taxes due with regard to more than five thousand parcels located within Rock County. (R. Doc. 77, pp. 204-205) Helen Ritter had been a licensed real estate broker/salesperson in Illinois and Wisconsin for many years previous. (App. at A-20; R. Doc. 77, pp. 113-114) Sometime early in 1985, the Ritters had received a document entitled, "STATEMENT OF REAL ESTATE TAXES FOR THE YEAR 1984" from the treasurer of the Town of Newark. (R. Doc. 77, p. 61; R. Doc. 79; App. at A-25-26) The statement contained a substantial amount of information regarding the description, assessed valuation and estimated fair market value of the subject property, the amount and rate of assessment of each taxing jurisdiction, as well as other information involved in the calculation of the actual amount of real estate taxes due. At the upper right corner, the statement contained the warning that, "DELINQUENT TAXES ARE SUBJECT TO INTEREST FROM JANUARY 1ST UNTIL PAID, AND ALSO MAY BE SUBJECT to AN ADDITIONAL PENALTY." (R. Doc. 79) Below this warning, the statement noted that the total amount of the 1984 property taxes due on the subject parcel was $710.03, which could be paid in two installments of $355.02 and $355.01 on February 28, 1985, and July 31, 1985, respectively, or full payment would be due by February 28, 1985. (R. Doc. 79)

As a licensed real estate businesswoman for decades before her tax delinquency arose, Helen Ritter had received specific training with regard to the impact of real estate liens on interests in real property, including those liens arising from delinquent real estate taxes. (R. Doc. 77, pp. 112-113) She acknowledged that she understood the significance of the "NOTICE OF REDEMPTION TAXES" which appeared on her tax bill each year starting with the 1985 taxes. (App. at A-26; R. Doc. 77, pp. 116-117)

At trial, Helen Ritter initially testified that she had mailed the second installment of property taxes in July of 1985, using a money order, suggesting that this was the first of two such money orders she had sent to pay up the last installment of 1984 taxes and which petitioners claimed were lost or misplaced by the County. (R. Doc. 77, pp. 63-64).

However, on cross-examination at trial with regard to an exchange of letters between the county treasurer's office and herself dated December 3, and 9, 1985 (R. Doc. 77, pp. 121-123), Helen Ritter admitted that she had realized back in 1985, or by February 1, 1986 at the latest, that she or Elmer Ritter had cashed the money order she had purchased in July, 1985 and used the proceeds to pay something else. (See discussion in Court of Appeals decision, App. at A-20-24; R. Doc. 77, p. 125)

Petitioners' own evidence showed that as a result of their actions, they were more than six months delinquent in submitting payment of the second installment due on the 1984 taxes, even if they did actually attempt to send in this payment as they currently claim. (R. Doc. 81; R.

Doc. 77, pp. 63-64) As an experienced businesswoman, Helen Ritter was able to appreciate that the type of money orders she utilized meant that the "receipts" she copied and sent to the county treasurer's office, being totally within her control, were susceptible to manipulation and lacked meaningful value as documentation that the money orders had been utilized as claimed. Yet, petitioners refused repeated County requests for other evidence of payment. (App. A-22-24; R. Doc. 77, pp. 118-119)

Helen Ritter's only explanation for why she had not arranged to cancel the wayward money order and make the final payment of 1984 taxes due, immediately upon being advised that the county treasurer had not received the second money order she says she purchased in February, 1986, was that she "must have had a mental block." (R. Doc. 77, pp. 126-127) The trial court made a factual finding "[t]hat the 1984 real estate taxes on the Ritter property were not paid" (App. at A-4) This finding has not been challenged in the Petition filed with this Court, nor was it challenged in the appeal to the Wisconsin Court of Appeals which petitioners seek to have this Court review. (App. at A-19, fn 2)

B. The Petitioners misrepresent relevant Wisconsin Law and the precedent of this Court which they cite in support of their arguments.

Section 75.521 of the Wisconsin Statutes provides a detailed procedure for the collection of local property taxes that are essential to the operation of the several units of local government in Wisconsin. Several relevant portions are set forth in the Appendix to the petition.

(App. A-52-65) The statutory design set up in Section 75.521, provides a method of foreclosing tax delinquencies on real estate to establish marketable title free of the liens of third-parties and the ownership interest of the previous holder. Petitioners contend that the notice utilized by Rock County, as required by Section 75.521, "is contrary to the established requirements of procedural due process annunciated by this Court in decisions dating from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 76 S.Ct. 652 (1950)." Petition at 9.

The Court of Appeals responded specifically to the cases of this Court cited by petitioners, noting in their analysis that due process is a "flexible concept", that "must give 'due regard for the practicalities and peculiarities of the case' at hand." App. at A-33-34, quoting, *Mullane*, 339 U.S. at 314-15, as well as Wisconsin caselaw. *Memphis Light, Gas & Water Division v. Craft, Co.*, 436 U.S. 1 (1978) was specifically discussed by the Court of Appeals and distinguished, along with other cases relied upon by petitioner, as not reflecting the relevant context of "a tax sale of real estate such as the Ritters'." App. at A-37-38. Without offering any logical explanation how this is so, petitioners merely persist in criticizing the legal conclusions reached by the Court of Appeals, loosely referring to grossly distinguishable prior decisions of this Court as though the differences pointed out by the Court of Appeals can be obliterated by repetition and willfulness. Petitioners take the same liberties in summarizing the Court of Appeals decision set forth in the Appendix to their Petition that they take with regard to the precedents of this Court. For example, petitioners refer to the Wisconsin Court of Appeals as "acknowledging that the

notice did not comply with the pronouncements of this Court with respect to the requirement of due process as set out in *Memphis Light*. . . . " Petition at 17. This is hardly a literal translation of the Court of Appeals' statement of its understanding of this Court's ruling in *Memphis Light*.

> . . . The Court makes clear, however, that it considered the termination of utility service to be a special situation because of the health and safety concerns that accompany cessation of heat, light and water services, [citation omitted] . . . We are not at all persuaded that *Memphis Light* requires such expanded notice with respect to a tax sale of real estate such as the Ritters'. App. A-37-38.

The significance of the context of Section 75.521 and other tax related Wisconsin statutes in gauging the adequacy of the notice given in the foreclosure of tax liens in Wisconsin was emphasized by the Court of Appeals. Included in its decision in this case was the observation made by the Wisconsin Supreme Court in a challenge to the same statute arising many years earlier, regarding the reasonableness of believing the notice required by Section 75.521(6) (see App. at 58-62) would adequately advise the persons receiving it of the pending proceedings.

> "[O]ther statutes have provided for notice to the taxpayer of assessment; opportunity to examine the tax rolls; time and place of hearing before the board of review; time, place and method of payment; delinquency; sale; time limitation for redemption, etc. . . . Such notice is sufficient to satisfy the requirements of due process."

App. at A-40-41, quoting *Devitt v. Milwaukee*, 261 Wis. 276, 278, 52 N.W.2d 872, 873 (1952).

The notice here, coming as it did after all the other procedures and notices pertaining to the assessment and collection of real estate taxes in Wisconsin, told petitioners that their property was in the process of being foreclosed, that they had a right to redeem by the deadline, and cited the statutes, had they wanted to use the limited answering procedure spelled out thereunder. In short, petitioners had every opportunity to protect their property; due process requires no more. While the Ritters complain that the Court of Appeals distinguished the non-real estate taxation cases they cited from this case, they offer no support in their Petition for the proposition that this is not consistent with the rationale contained in those cases.

Section 75.521(6) tracks closely the limited, *"In Rem"* nature of the procedure authorized by that statute and requires that the notice include the statement "No personal judgment will be entered herein for such taxes, assessments or other legal charges or any part thereof." (App. at A-60) Obviously, the limitation on the government unit's ability to seek a personal judgment reduces the possible reasons why a former property owner might choose to undertake the further expense of fighting to maintain title to property which had proven difficult to keep free of delinquent taxes. Petitioners cry that this statement in the notice is "even misleading." (Petition at 13) without showing how they come to that assertion. The record reflects the judicial finding that Helen Ritter, at least, understood about the foreclosure of unpaid real

estate taxes and should not have been misled by this language. (App. at A-26)

The Foreclosure of tax liens by action *in rem* procedure under Section 75.521, Wis. Stats., which Rock County was following at all times, was reasonably intended to apprise taxpayers much less able than the Ritters of the pendency of any adverse action. In accordance with Section 75.521(12)(b), Wis. Stats., a guardian ad litem must be appointed to serve, in the proceedings at issue for all such proceedings, for all persons known or unknown who have or may have an interest in the lands described in any list and who are or may be minors or incompetents at the date of filing such list. Petitioners rightly declare that the fundamental requisite of due process is the right to be heard (Petition at 9), where there is in fact process which is due. *Waukesha County v. Young,* 106 Wis. 2d 244, 249, 316 N.W.2d 362, 365 (1982) was cited by the Court of Appeals for the proposition adhered to in Wisconsin caselaw that taking of land for failure to pay property taxes is a drastic remedy requiring strict compliance with statutory procedures. (App. at A-41, fn. 11) Consistent with that view, Wisconsin courts have held that motions seeking relief from a tax foreclosure judgment on the ground that it is void for noncompliance with the statutory requirements or insufficient service to satisfy the requirements of due process "are permissible if brought within a reasonable time' " *Young,* 106 Wis.2d at 253.

However, the Court of Appeals corrected the trial court by noting that a tax deed results from the foreclosure of a tax lien under section 75.521, Wis. Stats., and "foreclos[es] all rights, titles, interests, liens, and claims

in the property . . . subject to the foreclosure.' " (App. at a-27, fn. 5), quoting *Leciejewski v. Sedlak*, 116 Wis.2d 629, 639, 342 N.W.2d 734 (1984). For this reason, as noted by the Court of Appeals, there is no basis for petitioners having any claim of interest in their former property, once the tax lien is foreclosed and tax deed title vests in the County. See App. at a-20, discussing *Oosterwyk v. Milwaukee County*, 31 Wis.2d 513, 517, 143 N.W.2d 497, 499, *cert. denied*, 385 U.S. 981 (1966). And it is well-established that to maintain a claim under the Takings Clause, a party must have an interest in the property at the time it is alleged to have been taken by the government. App. A-28, citing *United States v. Dow*, 357 U.S. 17, 20 (1958). For this reason the petitioners had no right to any proceeds from a subsequent sale or other profitable use of this property after they lost it.

REASONS FOR DENYING THE WRIT

A. The Wisconsin Court of Appeals properly applied the relevant precedents of this Court to the facts of this case.

A property owner is responsible to know the laws governing ownership of real property. Under the jurisprudence of this Court, State law generally governs the nature of interests in real property. *Texaco, Inc. v. Short*, 454 U.S. 516, 70 L.Ed.2d 738, 102 S.Ct. 781 (1982), contains discussion regarding a long line of Supreme Court decisions upholding the power of a State to broadly define the nature of property rights recognized and enforced under the laws of that State. That case, itself, dealt with

the constitutionality of the Indiana Mineral Lapse Act, in its provisions conditioning the retention of a property right upon the performance of an act (filing a statement of claim) by the owner of a property interest (mineral right) within a limited period of time (20 years). The Court discussed cases involving claims that states had not adequately notified property owners of the legal requirements of statutes affecting their property rights. This Court said the question raised was simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law.

> "The answer to this question is no different from that posed for any legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. . . . *It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.*"

Texaco, Inc. v. Short, supra, 70 L.Ed.2d at 752, emphasis supplied.

The constitutional law is clear that all that is required of a notice of lien foreclosure to meet due process requirements is "a notice reasonably calculated, under all the circumstances, to apprise the holder of a legally protected interest in the property of the *pendency of the action*, and to afford the interest holder an opportunity to present his or her objections. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). In other words, a state must make efforts to provide actual notice

to all interested parties. The Wisconsin Statute undertakes to proceed in rem, by making the land, as such, answer for delinquent real estate taxes. The primary object of the statute is to reach the land which has been assessed. The notice requirement has been determined to be satisfied by mail service to the person having an interest in the land. See the discussions of The Supreme Court's Construction of Due Process Requirements Regarding Notice in Proceedings to Foreclose Real Property Tax or Similar Lien found at Anno, 77 L.Ed.2d 1485 and Anno, 1 L.Ed.2d 171. No cases cited therein require that an interest holder be given more notice than the fact that the action has been commenced for foreclosure of the tax lien. There is no overlay requirement of notifying the interest holder of what additional statutory rights they may have.

In *Weigner v. City of New York,* 852 F.2d 646 (2nd Cir. 1988), the city "gained possession of property worth between $183,000 and $250,000, because an elderly out-of-state widow failed to pay less than $10,000 in property taxes." Dissent, at 657. More often than not, foreclosure is a losing proposition and because it happens only due to the plaintiff's failures it does not constitute a "taking" for purposes of the Fifth Amendment.

Where there is no nexus between the facts alleged and a deprivation of a constitutionally protected right, a complaint will be dismissed for failure to state a cause of action under 42 U.S.C. Section 1983. *Asher v. Harrington,* 318 F. Supp. 82 (E.D. Wis., 1970), *aff'd,* 461 F.2d 890 (7th Cir. 1972). Governmental officials must be found to have

acted with deliberate indifference. The Seventh Circuit Court of Appeals has defined "deliberate indifference" as "actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Santiago v. Lane*, 894 F.2d 218, 221 n.7 (7th Cir. 1990). Negligent conduct may not form the basis of a claim under 42 U.S.C. 1983. *Daniels v. Williams*, 474 U.S. 327 (1986)

Petitioners' claims under section 1983 are barred by the doctrine of qualified immunity. A government official exercising a discretionary function is shielded from liability and suit in a Section 1983 action unless the official violated a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). The constitutional right must be clearly established in a particularized sense. *Anderson*, 483 U.S. at 639. Plaintiff bears the burden of proving the existence of a clearly-established right. *Alvarado v. Picur*, 859 F.2d 448, 452 (7th Cir. 1988).

B. The presumption under 42 U.S.C. §1988 in favor of awarding attorney fees to a prevailing plaintiff does not apply where, as under the facts of this case, an award of fees would be unjust.

There is a virtual continuity of principles underlying the legal doctrines which the Ritters seek to invoke to their betterment, which more strongly supports the opposite result. Opposing counsel cite correctly the overall intent of §1988 as being that a prevailing plaintiff "should

ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 1934 (1983). However, we can think of few circumstances less appropriate to make such an award as are present in this case. The neglectful, if not more questionable, contributions which the Ritters made toward the result of the foreclosure of an $84 tax lien on their property and their stubborn insistence on making this a major federal case, rather than attempting to work cooperatively closer to home to resolve the real questions (for instance, the fact, admitted by Helen Ritter, that they were six months delinquent in making the second payment on their 1984 real estate taxes. (R. Doc. 77, p. 124)

Although mindful of the continuing need for public officials to be as responsive as possible to the varying circumstances of individual members of the public, we submit that under "the totality of the record of this case," making the other taxpayers of Rock County, many of whom struggle meeting their share of property tax burdens, pay the attorney fees of the Ritters, "would render such an award unjust." *Busche v. Burkee*, 649 F.2d 509, 521 (1981).

The Ritters have seemed, from the start, to have been as laggard in their willingness to explore the procedures provided under the real estate tax collection system, as they have been eager to pursue a federally based remedy for all the ills they have experienced. On the record of the marathon legal adventure which has come out of $84.43 in unpaid taxes, Helen Ritter has managed to make a mind-numbing maze out of construing the "NOTICE OF REDEMPTION TAXES" which appeared on her tax bill

for years. She was a licensed real estate businesswoman for decades before her tax delinquency arose. She had received specific training with regard to the impact of real estate liens on interests in real property, including those liens arising from delinquent real estate taxes. (R. Doc. 77, pp. 112-113) She had been involved in so many lawsuits that she was unable to recall major aspects of those lawsuits in which she was involved between the time her 1984 taxes became delinquent and the September, 1994 trial of this matter. She could not recall whether or not she had drafted and filed her own answer and counterclaim in one suit. (R. Doc. 77, pp. 107-108) She could not even recall the sequence of the lawsuits she was involved in during the preceding four period between 1985 and 1989. (R. Doc. 77, pp. 108-109)

Respondents agree that the drastic nature of the foreclosure of real estate tax liens and the important constitutional principles which have been invoked by petitioners justify the careful judicial scrutiny which has previously been afforded to petitioners' complaints by the many federal and state judges who have already considered the matters raised by the Ritters and the able and energetic lawyers who have represented them. But, Rock County respectfully submits the trial court and the Wisconsin Court of Appeals properly reached the conclusion that petitioners have exhausted the limits of the relief which should be given to them in this case. We believe this conclusion is well-supported by the gritty truths revealed by the factual record of the short two day jury trial had below, in this matter, which was cut dramatically short by

the strong reaction which the trial judge had to the witnesses' testimony and factual evidence he so closely observed.

As the record reveals, the Ritters certainly had more of a day in court, and received an emotionally sympathetic response, if not a gratifying legal result, because of the characterization of their plight which they were able to achieve in the context of the motion practice exercised in the petitioners' journey up through virtually the entire federal judicial system, while they had successfully kept on hold the state lawsuit which by every design of law was intended to offer them the more expedient and less costly way to protect their interest in the subject property.

Compare the poignant observations of Judge Wood of the Seventh Circuit Court of Appeals in *Ritter v. Ross*, 992 F.2d 750 (7th Cir. 1993), *reh'g denied, cert. denied*, 114 S.Ct. 694, 126 L.Ed.2d 661 (1994) ("For want of a nail the shoe is lost, . . . ") and at p. 755 (" . . . we must admit our surprise and dismay that the dispute over the Ritters' alleged back taxes was not solved in Rock County."), with the remarks of Judge Welker, after his direct observation in the temporary absence of the jury of what the County intended to bring out in its cross-examination of Helen Ritter in the trial below.

> " . . . just so there is no question when we reconvene here [in the presence of the jury] about what the court will and will not permit, the testimony – the test of what is relevant is whether it makes an ultimate fact more likely than would be true without that testimony. And in this regard, I do not think that the testimony that Ms. Ritter has an abrasive personality or

generally and with respect to other people is relevant. Obviously she has now said that Miss Ross treated her unkindly in a phone conversation . . . And if there was some sort of abrasive talk on that occasion that would be proper. But whether Miss Ritter gets along with other people or not I don't think is relevant to this lawsuit. Also, I don't think that the specific nature of other lawsuits and their outcome, whether somebody did or didn't get a judgment against her, I don't think any of that is relevant to this lawsuit . . . and I think that whatever marginal relevance it may have would be outweighed by the unfair prejudicial effect. Now, having said that, *I do believe that it is relevant that she is a real estate broker. That she has asserted in court under oath that she is an expert on matters that real estate brokers are trained in.* And I believe the real estate examining board even has questions on real estate taxes. I am not positive about that. But any related matter that has to do with her knowledge of these things *and she is a real estate broker and licensed and has been licensed as a real estate salesperson in Illinois that she has testified in court that she is an expert witness in those areas I believe that is relevant. Further, I believe that it is relevant that she has been involved in several pieces of litigation, and is therefore conversant with the legal process and that she has drafted pleadings on her own behalf and filed those pleadings in other lawsuits and that she has on occasions hired lawyers to represent her in other matters and therefore knows the importance of having a lawyer. I think all of those matters are relevant. They go to the question of her ability to understand the importance of a legal*

document and her ability to understand the communications that she did have."

(R. Doc. 77, pp. 104-106; emphasis supplied)

As is clear from the trial record, by the time the second installment of the petitioners' 1984 taxes were noted to be overdue, Helen Ritter had developed a remarkable familiarity with the process of legally resisting demands asserted against her and her husband, by fashioning defenses and counterclaims on her own, while bringing in so many different attorneys when that seemed wise, that she confessed to not being able to remember who they were (R. Doc. 77, pp. 97, 152), or what they had discussed with her. (R. Doc. 77, pp. 109-111, 127-129, 132) In fact, Mrs. Ritter apparently had been involved in so much litigation in her subsequent Wisconsin based career that she was unable to recall whether or not she had been personally involved in litigation while working as a real estate sales person in Illinois. (R. Doc. 77, p. 113)

It is elemental that there has to be a truly reasonable need to invoke federal law in defense of federally protected civil rights, before reasonable attorney's fees are properly available under 42 U.S.C. §1988. We believe that the Ritters' real problem with the trial court's ruling stems from the actuality, apparent from the record viewed as a whole, that what Judge Welker found was not that there in fact was a violation of the federally protected civil rights of the Ritters, but rather, that the trial court found to be Rock County's good faith misinterpretation of Sections 75.521 and 75.69, Wis. Stats., would have resulted in such an unconscionable (to Judge

Welker) windfall to Rock County that it seemed tantamount to a civil rights violation if the trial court were not able to act on the interpretation of those state statutes which the trial judge determined he could adopt only on the basis of avoiding constitutional harm (perhaps, since more general equitable principles did not seem to fit petitioners' circumstances). This was not an instance of the trial court being confused between the nature of punitive and compensatory damages, as claimed by petitioners, but of the trial judge believing that construing state law and constitutional principles in the particular, combined manner that he did best serve the overall goals of justice. As the Wisconsin Court of Appeals and the Wisconsin cases cited, earlier show, this was consistent with the broad powers of the judiciary under section 75.521 (14a) (see App. at A-62-65); *Waukesha County v. Young*, supra.

This view is in accord with *Williamson Regional County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson* it was held that a Section 1983 regulatory taking claim is not ripe unless or until (1) the plaintiff obtains a final decision and (2) seeks just compensation through available state procedures. This second test of *Williamson* requires that if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the state procedure and has been denied just compensation. *Williamson*, p. 195. The taking clause does not proscribe the governmental taking of property, but only taking without just compensation. Thus, no constitutional violation occurs until just compensation has been sought and denied at a final stage

of the process available under local law. The Ritters were not denied just compensation by Judge Welker.

Respondents respectfully submit that in the event constitutional infirmities are found, the award of attorney fees should be considered in the light of the specific facts of this case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Writ of Certiorari and affirm the Wisconsin Court of Appeals' decision dismissing the Ritters' complaint for failure to show any violation of federally protected right.

Dated this 10th day of October, 1997.

Respectfully submitted,

EUGENE R. DUMAS
Deputy Rock County
Corporation Counsel
51 S. Main St.
Janesville, WI 53545
(608) 757-5530
Attorney for Respondents
Peggy S. Ross,
County Treasurer for Rock County,
and Rock County